

NTSB Order No. EM-195

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9th day of June, 2003

CHRISTOPHER J. DRESSER,  
Appellant.

Docket ME-173

The appellant, by counsel, challenges a decision of the (now) Commandant (Appeal No. 2626, dated February 19, 2002) affirming a decision entered by Administrative Law Judge Archie R. Boggs on February 4, 1999, following an evidentiary hearing.<sup>1</sup> The law judge sustained a charge of use of a dangerous drug on a specification alleging that the appellant had tested positive for

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marijuana during a pre-employment drug test. He accordingly ordered the revocation of appellant's merchant mariner's document and license.

On appeal to the Board, appellant raises essentially the same substantive and procedural objections he presented, to no avail, to the Vice Commandant. Because we conclude, for the reasons discussed below, that the Vice Commandant's decision did not apply the appropriate legal standard in reviewing appellant's contention that the law judge should have recused himself following an ex parte communication, we reverse the Coast Guard's decisions and remand the proceeding for a new hearing before a different law judge.<sup>2</sup>

The appellant defended against the Coast Guard's drug charge by contending that the positive test result on which it was based was not attributable to an unlawful use of marijuana, but, rather, by his lawful ingestion of liquid hemp seed oil, a legal dietary supplement, that can also cause metabolites of marijuana to show up in a hemp seed oil user's urine.<sup>3</sup> The law judge was not persuaded by the contention. Instead, based on his review of the evidence, the law judge concluded that the appellant's "attempted exculpatory defense [should be] rejected as a latter-day fabrication." See Decision and Order at page 46.

At some point after the evidentiary hearing had been held,

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<sup>2</sup>In light of this disposition, we have no occasion to comment on any of the appellant's other assignments of error.

<sup>3</sup>In view of the impact of this potential consequence on the Coast Guard's random drug testing program, the Commandant, during the pendency of this case, adopted a policy that forbids Coast

but before a written decision and order had been served, the law judge, during a dinner at his home with his son, learned that his son, an attorney, was counsel for the defendant in a civil lawsuit that the appellant had initiated against the manufacturer of the hemp seed oil he claimed to have been taking for a period of time before the drug test that led to this revocation action. The law judge subsequently indicated, in seeking advice from others within the Coast Guard as to whether he was obligated to disqualify himself, that the discovery of his son's participation in the product liability case in which appellant was a party effectively terminated any further discussion of the matter and that the merits of the case had not been discussed. Appellant's recusal motion followed the law judge's self-reporting of the occurrence.

The Commandant essentially determined that the law judge was not required to remove himself as the hearing officer because the appellant had not proved that he had "a personal bias in this matter or prejudged the case based on his alleged *ex parte* communications with his son and the Coast Guard" (Decision at 13). We share the appellant's view that this was not the appropriate standard to apply. The issue was not simply whether actual bias or prejudgment had been demonstrated, but also whether the circumstances presented an unacceptable appearance concerning the law judge's impartiality. A conclusion that such an appearance existed here seems inescapable to us, both in light of generally accepted ethical principles on conflicts and the

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Guard personnel from using hemp seed oil.

Coast Guard's own written policies on the subject.

The Coast Guard's administrative law judges, in the suspension/revocation proceedings over which they preside, are expected "to strive to avoid even an appearance [of partiality] to the position of either party to a proceeding" and "are held to the same standards regarding bias, prejudice and interest as are all members of the federal judiciary" (see Commandant's Administrative Law Judges Internal Practices and Procedures No. 16722.13 (1987)). Under 28 U.S.C. § 455, which sets forth the relevant standards for the federal judiciary, a judge must disqualify himself whenever "his impartiality might reasonably be questioned" and whenever, among other times, he "or a person within the third degree of relationship to" him "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding" (28 U.S.C. §§ 455(a) and (b)(5)(iii)). We think the circumstances confronting the law judge in this case fell well within the intent of these provisions.

We note at the outset that nothing in the record before us suggests that the law judge's decision was based on anything but the evidence adduced at the hearing, and we commend him both for disclosing the communication with his son and seeking advice on the propriety of continuing to preside over the case. Nevertheless, several circumstances over which the law judge had no control, but which should have been recognized as warranting his recusal, created an appearance of conflict that would support a finding that "his impartiality might reasonably be questioned"

(*id.*). Although the particulars of the appellant's lawsuit are not in the record, it appears reasonable to assume, in the context of a product liability action, that the appellant seeks to hold the manufacturer of the hemp seed oil liable for damages caused by the positive drug test result that led to this proceeding. Because the law judge's son is representing the manufacturer, it should have been apparent that a decision finding that the positive drug test was not the result of hemp seed oil ingestion would directly benefit the manufacturer and, therefore, his son as well.<sup>4</sup> A process dedicated to fairness in practice and appearance cannot tolerate the potential for partiality created by the propinquity of the players in the inter-related cases. In our view, since there was no way to objectively evaluate the possible impact of the law judge's son's connection to this matter on the law judge's decision-making, the resolution of the appellant's fate in the adjudication should have been re-assigned by the Coast Guard to a law judge who could not be said to have, or appear to have, a personal interest in the outcome of either proceeding.

**ACCORDINGLY, IT IS ORDERED THAT:**

The docket is remanded to the Commandant for further proceedings consistent with this Opinion and Order.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

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<sup>4</sup>In fact, it appears that the parties to the civil litigation agreed to give the law judge's determination on this issue dispositive weight in that action.